

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 28, 2009

REBECCA METTES v. J. THOMAS JOHN, JR., M.D.

Appeal from the Circuit Court for Davidson County
No. 06C-3306 Thomas W. Brothers, Judge

No. M2008-00901-COA-R3-CV - Filed May 20, 2009

In this medical malpractice action, patient appeals the trial court's grant of summary judgment in favor of physician based on the insufficiency of the affidavit of the patient's expert. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Jeffrey B. Cox, Murfreesboro, Tennessee, for the appellant, Rebecca Mettes.

Michael F. Jameson, Nashville, Tennessee, for the appellee, J. Thomas John, Jr., M.D.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Dr. J. Thomas John, Jr., a licensed physician board-certified in internal medicine and rheumatology and practicing in Nashville, Tennessee, first saw Rebecca Mettes on February 2, 2004, for complaints of right wrist pain. Dr. John treated Ms. Mettes through December 16, 2005.

Ms. Mettes filed the instant medical malpractice lawsuit against Dr. John on December 15, 2006. She alleges that, when she saw Dr. John on March 4, 2004, he interpreted her x-rays as being normal and subsequently administered several cortisone injections. According to Ms. Mettes, Dr. John advised her that she was suffering from fibromyalgia. On December 16, 2005, Ms. Mettes reported worsening symptoms, and Dr. John ordered additional x-rays, which showed changes in the bone structure in her wrist. In January 2006, Ms. Mettes sought treatment from Dr. James N. Johnson, an orthopedic specialist, who interpreted the March 4, 2004 x-rays as showing evidence consistent with early Kienbock's disease and the December 16, 2005 x-rays as showing advanced

Kienbock's disease.¹ X-rays taken by Dr. Johnson showed severe Kienbock's disease with severe collapse of the lunate bone. Dr. Johnson referred Ms. Mettes to the Vanderbilt University Medical Center hand clinic.

Ms. Mettes's complaint asserts that Dr. John negligently failed to properly diagnose and treat Ms. Mettes's condition and that the treatment given to her by Dr. John aggravated her condition and caused it to worsen. She alleges that the multiple cortisone injections "more likely than not, contributed to further deterioration of her bone and aggravation of her Kienbock's disease."

Dr. John answered the complaint, denying any negligence or medical malpractice, and later filed a motion for summary judgment supported by his own affidavit in which he stated that his treatment of Ms. Mettes was "in full compliance with the recognized standards of acceptable professional practice in the profession of medicine as those standards existed in Nashville, Tennessee in 2004." Dr. John further opined that, within a reasonable degree of medical certainty, Ms. Mettes's injuries were "not attributable to any alleged negligent act or omission on my part."

In opposing Dr. John's motion for summary judgment, Ms. Mettes filed the affidavit of Dr. James N. Johnson, a specialist in orthopedics and sports medicine, who stated that he was "familiar with the standard of care for orthopedic physicians in the Nashville[,] Tennessee and surrounding areas." He described his treatment of Ms. Mettes and his findings of Kienbock's disease on the March 2004 x-rays and later x-rays. Dr. Johnson opined that "the Cortisone injections [administered by Dr. John] could possibly have contributed to the deterioration of the bone." He stated that, in light of the evidence of sclerosis of the lunate bone in the March 2004 x-rays, cortisone injections were contraindicated. Dr. Johnson concluded: "[I]t is my opinion that the treatment rendered to the Plaintiff by the Defendant was below the standard of care for physicians of like training, skill and expertise practicing in this area, and that as a result of that treatment, the Plaintiff sustained injuries." In a reply brief, Dr. John challenged the sufficiency of Dr. Johnson's affidavit.

At a hearing on April 11, 2008, the trial court granted Dr. John's motion for summary judgment. In its May 7, 2008 order, the court gave the following reasoning:

[T]he Court is of the opinion that the affidavit testimony of Plaintiff's expert witness, Dr. Johnson, is insufficient by virtue of (1) its failure to establish that Dr. Johnson practiced a relevant profession or specialty during the year preceding the alleged events and/or injury at issue; (2) its failure to establish the applicable standard of care and Dr. Johnson's familiarity therewith; and (3) its failure to establish causation with the requisite degree of certainty required.

On appeal, Ms. Mettes assigns error to the trial court's decision to grant summary judgment in favor of Dr. John.

¹Kienbock's disease is a form of avascular necrosis (cell death in the absence of infection) of the wrist. 5 Roscoe N. Gray & Louise J. Gordy, ATTORNEYS' TEXTBOOK OF MEDICINE § 18C.12(3) (3^d ed. 2001).

STANDARD OF REVIEW

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). In reviewing a summary judgment, this court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997). The party seeking summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that the party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). We must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. *Id.*; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). If there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20, 25 (Tenn. 1975). To shift the burden of production to a nonmoving party who bears the burden of proof at trial, a moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 (Tenn. 2008).

A trial court is vested with broad discretion in determining the "admissibility, qualifications, relevancy and competency of expert testimony." *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 263 (Tenn. 1997). Thus, we review a trial court's decision regarding expert witness competency and qualifications under an abuse of discretion standard. *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002); *Taylor v. Jackson-Madison County Gen. Hosp. Dist.*, 231 S.W.3d 361, 371 (Tenn. Ct. App. 2006). There has been an abuse of discretion "when the trial court reaches a decision against logic that causes a harm to the complaining party or when the trial court applies an incorrect legal standard." *Riley v. Whybrew*, 185 S.W.3d 393, 399 (Tenn. Ct. App. 2005). The trial court's decision will be upheld "so long as reasonable minds can disagree as to the propriety of the [trial court's] decision." *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 751 (Tenn. 2000)).

ANALYSIS

The trial court identified at least three deficiencies in Dr. Johnson's affidavit, any one of which would make the affidavit insufficient to withstand a motion for summary judgment. In her brief, Ms. Mettes has failed to refute any of the bases upon which the court determined Dr. Johnson's affidavit to be insufficient but relies solely upon the requirement that, in the summary judgment context, the court must view the facts in the light most favorable to the non-moving party. Even though we view the facts in the light most favorable to Ms. Mettes and resolve all inferences in her favor, however, we cannot ignore the law concerning the plaintiff's burden of proof in a medical malpractice action.

Under Tennessee law, except in circumstances in which the alleged malpractice is within the common knowledge of laymen, the plaintiff in a medical malpractice action is required to prove by expert testimony the applicable standard of care, the defendant's breach of that standard, and

proximate cause. Tenn. Code Ann. § 29-26-115(a);² *Moon v. St. Thomas Hosp.*, 983 S.W.2d 225, 229 (Tenn. 1998); *Hessmer v. Miranda*, 138 S.W.3d 241, 244 (Tenn. Ct. App. 2003). Our Supreme Court has held: “[I]n those malpractice actions wherein expert testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff’s contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise.” *Bowman v. Henard*, 547 S.W.2d 527, 531 (Tenn. 1977). To effectively refute a claim of malpractice, the defendants “must present facts rebutting the allegations of [the] complaint as to at least one of the three statutory elements for medical malpractice actions.” *Fitts v. Arms*, 133 S.W.3d 187, 190 (Tenn. Ct. App. 2003). To refute one of the statutory elements, a defendant “must simply file an expert affidavit stating that all of his care and treatment of the plaintiff met the recognized standard of acceptable professional practice or that his treatment was not the cause of any injury to the plaintiff that plaintiff would not otherwise have suffered.” *Id.* at 191. A defendant may shift the burden by submitting his or her “own self-serving affidavit stating that their conduct neither violated the applicable standard of care nor caused injury to their patient that would not otherwise have occurred.” *Kenyon v. Handal*, 122 S.W.3d 743, 758 (Tenn. Ct. App. 2003).

In the present case, Ms. Mettes does not challenge the sufficiency of Dr. John’s affidavit, and we consider it sufficient to shift the burden of production to the plaintiff. Thus, to avoid summary judgment, Ms. Mettes was required to produce expert testimony to counter the defendant’s affidavit concerning the essential elements of her claim: the recognized standard of acceptable medical practice, the defendant’s breach of that standard, and causation. Tenn. Code Ann. § 29-26-115(a); *Bowman*, 547 S.W.2d at 531.

Pursuant to Tenn. Code Ann. § 29-26-115(a)(1), expert testimony must establish “[t]he recognized standard of acceptable professional practice in the profession *and the specialty thereof*, if any, that the defendant practices in the community. . . .” (Emphasis added). Tenn. Code Ann. § 29-26-115(b) likewise provides, in part, that the expert must have been licensed to practice “a profession or specialty which would make the person’s expert testimony relevant to the issues in the case.” The latter provision does not require that the expert practice the same profession or specialty as the defendant, “so long as the expert had a sufficient basis on which to establish familiarity with the defendant’s field of practice and the standard of care required in dealing with the medical care at issue.” *Bravo v. Sumner Reg’l Health Sys., Inc.*, 148 S.W.3d 357, 367 (Tenn. Ct. App. 2003); *see*

²Tenn. Code Ann. § 29-26-115(a) requires expert testimony to establish:

- (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
- (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
- (3) As a proximate result of the defendant’s negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

also *Cardwell v. Bechtol*, 724 S.W.2d 739, 751 (Tenn. 1987). Dr. Johnson's affidavit states that he is a specialist in orthopedics and sports medicine and is familiar with the standard of care of orthopedic physicians in Nashville and surrounding area. Dr. John is a specialist in rheumatology and internal medicine. There is nothing in Dr. Johnson's affidavit to establish his familiarity with the standard of care for a rheumatologist or internist in Nashville, Tennessee with respect to the detection and treatment of Kienbock's disease. There is nothing in the affidavit to establish that the standard of care for orthopedics with respect to Kienbock's disease was the same as the standard of care for internal medicine or rheumatology specialists. Thus, the affidavit does not give the court a basis to find Dr. Johnson competent to testify regarding the standard of care of a rheumatologist or internist in diagnosing and treating Kienbock's disease.

A second flaw identified by the trial court with respect to Dr. Johnson's affidavit also reflects upon his competency to testify about the applicable standard of care in this case. The expert must be licensed to practice in the state or a bordering state a relevant profession or specialty and must have "practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred." Tenn. Code Ann. § 29-26-115(b); see *Ayers v. Rutherford Hosp., Inc.*, 689 S.W.2d 155, 161 (Tenn. Ct. App. 1984). Dr. Johnson's affidavit is silent as to whether he was licensed to practice and practiced orthopedics in Tennessee or a bordering state at any time during the year preceding the time when the alleged malpractice occurred. See *Kenyon*, 122 S.W.3d at 761 (statutory requirement interpreted to require licensure and practice at some point during the preceding year, not necessarily for the entire year).

Given these two deficiencies in Dr. Johnson's affidavit, we find no abuse of discretion in the trial court's implicit finding that Dr. Johnson was not qualified to testify as to the applicable standard of care. Moreover, Dr. Johnson did not describe the applicable standard of care and in what way Dr. John allegedly deviated from that standard. See *Estate of Henderson v. Mire*, 955 S.W.2d 56, 59 (Tenn. Ct. App. 1997).

Furthermore, the trial court had a third ground for finding the affidavit insufficient to create a genuine issue of material fact: the absence of proof of proximate cause. The only specific treatment mentioned in Dr. Johnson's affidavit is the administration of cortisone injections. He opined that these injections "could possibly have contributed to the deterioration of the bone." A plaintiff must prove causation by a preponderance of the evidence; thus the plaintiff must prove that "the negligence *more likely than not* caused the injury." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598-99 (Tenn. 1993) (emphasis in original). The proof must establish that causation was "reasonably certain, and not a mere likelihood or possibility." *White v. Methodist Hosp. S.*, 844 S.W.2d 642, 649 (Tenn. Ct. App. 1992). Statements of "possibility" or "might have" have been found to be insufficient to establish proximate cause by a preponderance of the evidence. *Kilpatrick*, 868 S.W.2d at 602. Thus, Dr. Johnson's statement that the cortisone injections "could possibly have contributed" to Ms. Mettes's injuries is insufficient to establish proximate cause.

In the final sentence of Dr. Johnson's affidavit, he made the statement that Dr. John's actions fell below the applicable standard of care and that "as a result of that treatment, the Plaintiff

sustained injuries.” In addition to the conclusory nature of this assertion, we note that Dr. Johnson did not indicate with what degree of certainty he held this opinion. Our Supreme Court has stated: “Causation in fact is a matter of probability, not possibility, and in a medical malpractice case, such must be shown to a reasonable degree of medical certainty.” *Id.* We agree with the trial court’s conclusion that Dr. Johnson’s affidavit is not sufficient to create a genuine issue of material fact on the issue of proximate cause.

CONCLUSION

For all of the foregoing reasons, we affirm the decision of the trial court awarding summary judgment in favor of Dr. John. Costs of this appeal are assessed to the appellant, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE